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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1559

R. E. BAXTER, ET AL., *Petitioners,*

v.

RAILWAY EXPRESS AGENCY INCORPORATED, a/k/a REA EXPRESS; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; H. H. PHILLIPS, GENERAL CHAIRMAN OF BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES AND MR. H. H. PHILLIPS IN OPPOSITION

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit is not yet reported and is reproduced as Appendix A to the petition. The order and judgment of the United

States District Court for the Northern District of Ohio, Eastern Division, is not yet reported and is reproduced as Appendix B to the petition.

JURISDICTION

The judgment of the Court of Appeals was dated February 18, 1972, Appendix A to the petition. The Petition invokes the jurisdiction of this Court under Title 28, Section 1254(i) of the United States Code.

QUESTIONS PRESENTED

1. Does the Court have jurisdiction of a petition for Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit dated February 18, 1972, when such petition was not filed within ninety days after the entry of such judgment?

2. Did the Court of Appeals err in affirming an order of the District Court granting summary judgment to the respondent BRAC and Mr. H. H. Phillips, an officer of a subordinate unit thereof, on a complaint alleging wrongful discharge, in violation of rights under a collective bargaining agreement, and a breach of the union's duty of fair representation, when the undisputed sworn facts showed that the union had advised the individual plaintiffs that any of them could file a grievance claim under the collective bargaining agreement with their local lodge in accordance with established rules and procedures of the Brotherhood or could themselves pursue their grievances and none of the individuals ever filed a grievance claim with the union to prosecute or themselves prosecuted such a grievance?

STATUTES AND REGULATIONS INVOLVED

The complaint and petition are based on the provisions of Section 3, First (i) of the Railway Labor Act [45 U.S.C., Section 3, First (i)] which is quoted at page 2 of the petition.

STATEMENT OF THE CASE

The petitioners are employees of REA Express, a carrier subject to the provisions of the Railway Labor Act. The employees are represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC). The petitioners involved worked in the terminal operation of REA Express at Cleveland, Ohio. This terminal handled so-called transfer traffic, i.e., truck traffic to or from points in Northern Ohio that moved through the Cleveland terminal. On July 8, 1969, REA Express notified the General Chairman of the Brotherhood Express System Board for that area of its intention to reroute the transfer traffic by other routing. General Chairman Phillips attended a meeting of the employees of the Cleveland terminal to explain the situation to them. Some of these employees contended at such meeting that they were entitled to the benefits of Rule 12 of the collective bargaining agreement between BRAC and REA Express which provides, in substance, that if REA Express consolidates facilities or transfers work or positions, employees may follow their work. Mr. Phillips advised the employees that REA Express had consistently taken the position that when the traffic was rerouted Rule 12 was not applicable. He further advised them, however, that they could file grievance claims with their Local Lodge 2100 in accordance with the established rules and procedures of the BRAC and

that if they had any disagreement with his views they had a right to make an appeal within the BRAC. None of the employees, including petitioners, ever filed a grievance claim under the contract nor did any of them exercise a right to process their own grievance. The rerouting of the traffic did not result in a dismissal from service of any of the petitioners. In spite of these facts, the petitioners filed a complaint in the District Court against the carrier and BRAC et al. alleging that they had been improperly discharged in violation of their rights under the collective bargaining agreement and that they had not been properly represented with respect to their claims by the BRAC. It was also alleged that the BRAC and REA Express had entered into an agreement depriving them of their Rule 12 rights.

The BRAC and Mr. Phillips filed a motion for summary judgment supported by affidavit of Mr. Phillips setting forth, among others, the above-cited facts. In addition, there was attached to the affidavit the only agreements entered into by the BRAC and REA Express concerning operations of the carrier in Ohio which had no effect whatsoever upon any claims of the petitioners with respect to the rerouting of the Cleveland traffic.

The petitioners did not file any counter affidavit bringing into issue the basic facts. The District Court granted summary judgment and the Court of Appeals affirmed.

ARGUMENT

I.

The Petition Should Be Dismissed or Denied on the Grounds It Was Untimely Filed

The petition shows that the judgment of the Court of Appeals was entered on February 18, 1972. Title 28, Section 2101(c) of the United States Code and Rule 22 of this Court's Rules required the petition to be filed within 90 days after the entry of such judgment unless the time is extended by order of a Justice of the Court for good cause shown. This 90-day period expired on May 18, 1972 and no extension was requested. The respondent is advised by the Office of the Clerk of this Court that the petition was filed on May 20, 1972. It is thus untimely filed and should be dismissed or denied for failure of jurisdiction. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399; *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206. The petition does not present any important question of federal law, there is no conflict of decision and the decision below is clearly correct.

II.

The Petition Does Not Present Any Important Question of Federal Law Nor Does It Raise Any Valid Conflict of Decision

The petition clearly rests the claims of the petitioners upon Section 3, First of the Railway Labor Act which concerns disputes involving the interpretation and application of collective bargaining agreements. In a recent decision, *Andrews* v. *Louisville & Nashville Railroad Company,* — U.S. —, 80 LRRM 2240 (May 15, 1972), this Court held that such claims were subject to the exclusive jurisdiction of the Adjustment

Board procedures established by Section 3 of the Railway Labor Act. In *BRAC Local Lodge 2144* v. *REA Express,* 409 F.2d 312 (2nd Cir., 1969), the Court of Appeals for the Second Circuit held that the specific issue here involved was a "minor" dispute subject to the provisions of Section 3.

In the present case there was a dispute between petitioners and the carrier as to whether Rule 12 of the collective bargaining agreement between BRAC and REA Express, which governs their employment, was applicable to the carrier's rerouting of transfer traffic in northern Ohio. They were advised by the BRAC representative that REA Express had always taken the position that Rule 12 was not applicable to the rerouting of traffic but that if they believed they had a grievance they could file the grievance with their local lodge in accordance with the established rules and procedures of the BRAC so that the claim or grievance could then be prosecuted. None of the petitioners ever filed such a grievance claim nor have they ever claimed that they did. Instead they let time go by and then filed a general conclusory complaint alleging that they had been improperly treated.

The petition asserts that summary judgment should not have been granted against them on the basis of the decision of this Court in *Czosek* v. *O'Mara,* 397 U.S. 25. However, in that case the situation was different. There had been simply a dismissal of a complaint not, as in this case, a grant of summary judgment on the basis of a sworn detailed statement of facts that was not contradicted. The petition also asserts that the petitioners should have been given an opportunity to file supplemental pleadings. However, this case was before the District Court for an extended period of time

and the petitioners at no time availed themselves of this opportunity.

Finally, the petition asserts that an improper agreement was reached between BRAC and REA Express with respect to the transfer of the work. The uncontradicted affidavit of Mr. Phillips attached the only two agreements entered into by BRAC and REA Express relating to the carrier's operations in Ohio and neither of these agreements affected in any way the petitioners' claims under Rule 12.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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June 1972

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MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES

R. E. BAXTER, et al.,

Petitioners,

-v-

RAILWAY EXPRESS AGENCY, INCORPORATED, a/k/a/ REA EXPRESS; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; H. H. PHILLIPS, GENERAL CHAIRMAN OF BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Respondents.

BRIEF OF REA EXPRESS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

R. E. BAXTER, et al., Petitioners, -v- RAILWAY EXPRESS AGENCY, INCORPORATED, a/k/a REA EXPRESS; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; H. H. PHILLIPS, GENERAL CHAIRMAN OF BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATICN EMPLOYEES, Respondents.	No.

BRIEF OF REA EXPRESS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This brief is filed in opposition to the Petition for a Writ of Certiorari, dated May 18, 1972.

ARGUMENT

Even if the facts were as Petitioners assert (contrary to the findings of both the District Court and

the Court of Appeals), Vaca v. Sipes, 306 U.S. 171 (1967), disposed of their contention. An agreement in collective bargaining by parties upon whom the law imposes a duty to seek to reach agreement is simply not the equivalent of a "conspiracy", and it would be an abuse of the judicial process to permit merely the bald allegation of such to be treated as the basis for a lawsuit. The District Court and Court of Appeals therefore manifestly did not abuse their discretion.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari was mailed to John T. Collins, 630 Walbridge Building, Buffalo, New York 14202, and Richard I. Klein, 1700 Investment Plaza Building, Cleveland, Ohio 44114, Attorneys for Petitioners, and to Harold A. Ross, Ross, Kraushaar & Bennett, 1548 Standard Building, Cleveland, Ohio 44113, and James L. Highsaw, Jr., Highsaw & Mahoney, 1015 Eighteenth Street, N.W., Washington, D.C. 20036, Attorneys for Respondents, Brotherhood of Railway and Airline Clerks and H. H. Phillips, this 19th day of June, 1972.

ARTHUR M. WISEHART